

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-7661

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7661

THOMAS I. FITZGERALD, Public Administrator
of the County of New York, State of New York, as
personal representative of the Estate of JACINTO
VICENTE MEJIA RENTERIA, Deceased,

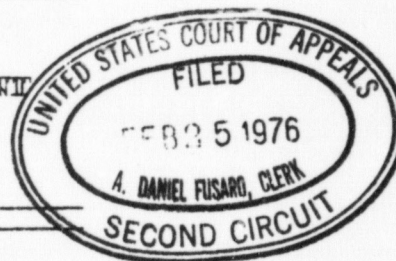
Plaintiff-Appellant,

against

ZIM ISRAEL NAVIGATION CO., ZIM ISRAELI
NAVIGATION CO., ZIM ISRAEL NAVIGATION
CO., LTD., ZIM LINES and AMERICAN-ISRAELI
SHIPPING CO., INC.,

Defendants-Appellees.

REPLY BRIEF OF PLAINTIFF-APPELLANT



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TABLE OF CONTENTS

	PAGE
Statement	2
POINT I - The acts of Zim-American-Israeli are attributable to Zim Israel Navigation Co., Ltd., in the United States.....	2
POINT II The defendants have claimed that a remedy exists under Israeli law; it is their duty to plead and prove Israeli law.	7
CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases	Page
Bartholomew v. Universe Tankships, Inc., 263 F. 2d, 437, 443 (2Cir. 1959) Cert. den. 359 U.S. 1000.....	7
Fitzgerald v. Texaco Inc., et al, 521 F. 2d, (448 (2 Cir. 1975).	7
Industrial Solvents Corp. v. Towboat Valley Voyager, 388 F. Supp. 1055 (SDNY 1975).....	5
 Statutes	
Death on the High Seas Act (DOHSA, 46 U.S.C.A. 761-768).....	6
Federal question; amount in controversy; costs - 28 U.S.C.A. 1331 (a)	7
Jones Act, 46 U.S.C.A. 688.....	6
 Other	
Journal of Commerce April 16, 1975	
Shipping card No. 64	2-3
Shipping card No. 243.....	2, 3
Article by Herb Lev.....	3-4
Description of Photograph.....	4
Advertisement of Zim Israel Navigation Co. Ltd.....	4-5

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REPLY BRIEF OF PLAINTIFF-APPELLANT

The appellant respectfully submits the following reply to the brief of the appellees .

STATEMENT

On page 5 of their brief, the appellees comment on contacts listed at pages 15 and 16 of the brief of the appellant. Because these comments of the appellees are not accurate, the appellant is submitting this reply brief .

POINT I

THE ACTS OF ZIM-AMERICAN- ISRAELI ARE ATTRIBUTABLE TO ZIM ISRAEL NAVIGATION CO., LTD. IN THE UNITED STATES.

Zim-American-Israeli is admitted to be the general agent and representative of Zim Israel in the United States. On November 17th, 1975, when plaintiff submitted a motion for in forma pauperis procedure in this Court copies of excerpts from the Journal of Commerce in New York City for April 16th, 1975 were attached to the motion papers .

Shipping cards number 64 and number 243 describe the shipping business of the defendants in the United States . Shipping card number 243 is on page 18, column 6 ; number 64 is on page 14, column 5 .

Number 64 gives the address of Zim Container Service as One World Trade Center, Suite 2960, New York, New York, 10048, 432-0610 . Reading further in the Shipping card, one sees the sailing dates from New York :

CS ZIM TOKYO Apr. 17

CS ZIM GENOVA May 8

CS ZIM NEW YORK May 18

At the bottom of card number 64 these offices are listed :

New York	212-432 0610
Chicago	312-341 0600
Los Angeles	213-189 3651
San Francisco	415-986 5717
Montreal	514-861 9210
Dallas	214-742 1693
Detroit	313-285 8710
Cleveland	216-886 3434
Philadelphia	215-922 2700
Baltimore	301-752 2910
Boston	617-742 6633

On turning to Shipping card 243, these sailing dates from New York appear :

CS ZIM HONG KONG	May 5
CS ZIM TOKYO	May 22
CS ZIM GENOVA	June 10

We can read on page 9 A these parts from an article by Herb Lev, Journal of Commerce Staff about Zim Israel Navigation Co., Ltd.

Column 1. " A great deal of business in shipping is based on habit," asserts Michael J. Bozza, senior vice president of traffic for Zim Container Service in New York " ****

Column 2. " The large container ships are used in the company's so-called "Three Continent Line," which provides fortnightly (and adjunct feeder)

service to Mediterranean, North American and Far Eastern ports. The roll-on roll-off vessels generally are employed in the Mediterranean trade, and the freighters, which can carry 20- and 40- foot containers as well; call at major U.S. Atlantic and Gulf ports." ****

Column 3. " This is a far cry from the late 1940s, when Zim's fleet consisted of a sole 3,500-ton passenger vessel. Now, the line carries everything but passengers, notes Capt. Reuven Ilan, vice president of operations for North America." ****

Columns 3-4. " An example of this commitment to providing a high level of customer service may be gleaned from remarks of Joseph Merante, Zim Container's vice president for sales, at a transportation and distribution seminar held in New York recently. " ****

Columns 4-5. " That is why, in Mr. Merante's view, "our vessel docks in Des Moines, Iowa the day we position a container there." For him, every facet of a container movement -including traffic, documentation, stowage and road restrictions-- "is a link in the total chain" of that movement."***

In Elizabeth-Port Authority Marine Terminal in the Port of New York, are container boxes ready for shipment on Zim vessels - as shown in a photograph on page 1-A .

At page 7-A of the same issue of the New York Journal of Commerce is a six-column advertisement tending in this manner :

ZIM ISRAEL NAVIGATION CO., LTD.

Owners' Representatives & General Agents :

ZIM-AMERICAN ISRAELI SHIPPING CO., INC.

One World Trade Center - Suite 2969

New York, N.Y.

Phone (212) 432-0610

This last excerpt was not included in the papers of the appellant on the motion in forma pauperis .

Can anyone doubt that Zim-American Israeli and Zim Navigation Co., Ltd., carry on a substantial business in the United States ? Zim Israel works through Zim-American and the operations of Zim-American are attributable to Zim Israel in the Western Hemisphere Section of this global shipping empire .

Industrial Solvents Corp. v. Towboat Valley Voyager

388 F. Supp. 1055 (1975), S. D. N. Y.

After finding that 11% of the total business volume of the defendant was produced in New York City, the Court held that this was a substantial share of the defendant's business . The Court denied the motion to transfer that case .

In the case at bar the defendants have stated that they do not know the percentage of cargo, by volume and by income, originated in or terminated in the United States during the employment of the deceased on the M. V. DAHLIA (plaintiff's interrogatory 27 c (4r, p. 5) - answer of the defendants (17 r, p. 5, ans. 27).

The substantial contacts of the defendants with the United States require that this case be held for trial in the Southern District of New York . The defendants are competing with United States shipping companies, taking advantage of United States Laws and they should be bound by the Jones Act (46 U.S.C.A. 688) , the General Maritime Law , and the Death on the High Seas Act (46 U.S.C.A. et seq.)

The substantiality of contacts is a question of fact and the plaintiff can subpoena officers of the defendants for further facts at the time of trial.

POINT II

THE DEFENDANTS HAVE CLAIMED THAT A REMEDY EXISTS UNDER ISRAELI LAW; IT IS THEIR DUTY TO PLEAD AND PROVE ISRAELI LAW .

The appellant claims that this case is governed by United States Law . 28 U.S.C.A. 1331 states the following :

" 1331. (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. "****

Because the defendants disagree with the officials of the National Insurance Institute of Israel, it is incumbent upon them to prove Israeli Law -if different from the statements in the letters of that Institute (87 a -89 a).

Under 28 U.S.C.A. 1331 jurisdiction is mandatory . In the case of Bartholomew v. Universe Tankships, Inc., 263 F. 2d, 437, 443 , Judge Medina said :

"Moreover, this is not a matter resting in the discretion of the trial judge, as seems to have been thought to be the case here. " ****

This aspect of the Bartholomew case is not referred to in the opinion in Fitzgerald v. Texaco, Inc., et al 521 F. 2d. 448 . In the latter case, the inability to implead other parties was a factor which led to the affirmance of the District Court's order . Furthermore, the ruling in the Fitzgerald v. Texaco case Supra does not apply here because law suits were pending in England and in the State of Delaware for cargo and death

claims . The law suit arose from a collision in the ^{Dover} Straits 12 miles from the coast of England .

C O N C L U S I O N

The orders and and judgments of the District Court should be reversed and the plaintiff permitted to continue this action under United States and Ecuadoran law in the Southern District of New York with a trial on the merits .

Respectfully submitted,

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